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IN THE

Supreme Court of the United States

October Term, 1975

No. 75-268

HYMAN RADZANOWER,

Petitioner,

vs.

TOUCHE, ROSS & CO., TELEPROMPTER CORPORATION, JACK K. COOKE, RAYMOND P. SHAFER, W.J. BRESNAN, H.J. SCHAFLY, LEONARD TOW, R.C. TODD, JR., B.P. SIMON, J.B. GREEN, L.H. READ, R.G. WILSON, H.E. FLAHERTY, B.D. FISCHMAN, BERLE ADAMS, MARVIN CARTON, R.F. LEWIS, P.L. LOWE, CHARLES LUCKMAN, M.B. MITCHELL, A.E. PUCKETT, J.H. RICHARDSON, M.E. LIVINGSTON, JACK WRATHER, FIRST NATIONAL BANK OF BOSTON,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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PETITIONER'S REPLY BRIEF

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Petitioner's Reply Brief

QUESTIONS PRESENTED

(1) In a securities violation case, may the more liberal venue provisions of the Securities and Exchange Act of 1934 co-exist with the more restrictive venue provisions of the National Bank Act of 1864 or does the Securities and Exchange Act prevail?

(2) Whether the First National Bank of Boston waived the venue provisions of Section 94 of the National Bank Act?

Contrary to the directions in the brief of First National Bank of Boston ("Boston Bank"), the first question does not take us exclusively onto the path toward the doctrine of implied repeal. This reply brief will deal only with the first question presented.

POINT I

THE ISSUE PRESENTED WAS RAISED AND PASSED ON BELOW

As in its opposing brief to the petition for certiorari, Boston Bank again here erroneously asserts that the issue involved was not raised below. That is incorrect. The District Court referred to the National Bank Act ("Bank Act") many times including when it thus held that since Boston Bank "is established in Boston, Massachusetts, within the meaning of 12 U.S.C. Section 94" (Opinion, Appendix 90a), the Bank Act expressly controls.

As discussed in Petitioner's reply to Boston Bank's brief in opposition to certiorari, Petitioner also raised the issue in the Circuit Court. During oral argument there, Petitioner's counsel quoted aloud from *Ronson Corp. v. Liquifin AktiengesellSchaft*, 483 F.2d 852 (3rd Cir. 1973). One member of the Panel asked Samuel Gottlieb, Esq., arguing for Petitioner, if counsel was requesting the Court to overrule *Bruns, Nordeman & Company v. The American National Bank and Trust Company*, 394 F.2d 300 (2d Cir. 1968), cert. den. 393 U.S. 855 (1968). The Court said it would not so overrule. Thus, the Circuit Court too passed on the question in its summary affirmance. Petitioner has done everything reasonable to preserve the record.

POINT II

IT IS NOT NECESSARY FOR THIS COURT TO FIND IMPLIED REPEAL BY THE EXCHANGE ACT 15 U.S.C. SECTION 78aa OF THE NATIONAL BANK ACT 12 U.S.C. SECTION 94 IN ORDER FOR THE MORE LIBERAL EXCHANGE ACT VENUE PROVISIONS TO CONTROL IN THIS SECURITIES CASE.

Respondent and the Amicus, i.e., Chase Manhattan Bank, First National Bank of Chicago, and the Comptroller, attempt to characterize and limit Petitioner's discussion solely to "implied repeal." This restricted view would of course be helpful to their side since implied repeal is more difficult to establish. But they refuse to deal with the real thrust of Petitioner's argument, that no implied repeal is necessary. Indeed, that major point of Petitioner's argument is merely casually mentioned in a footnote on page 15 of Respondent's brief and is never answered. Thus, everyone would seem to agree that the two venue provisions may co-exist. The real difference of opinion relates to terms of such co-existence.

Respondent and Amicus repeatedly define "co-existence" to mean that the Bank Act must oust the Ex-

change Act. This is based on their faulty premise that Bank Act venue is more "mandatory," "effective," "binding" or "special" than Exchange Act venue and in those fact patterns where both statutes apply (a National Bank as a securities defendant), a conflict is presented which can only be resolved by striking the later act. The erroneous nature of Respondent's premises will be discussed in detail below.

In contrast, Petitioner argues for true co-existence, with each statute given equal weight and each given full scope. Thus, it is totally unnecessary to find implied repeal or in any way to curtail either Congressional enactment.

Bank Act and Exchange Act venues can exist harmoniously together; each may encompass its own sphere. The Exchange Act merely adds an additional forum when a bank is sued for a securities related cause. For most causes, a bank may only be sued where established. However, when sued for a securities violation, it may also be sued where found or where the bank committed the wrong. Different venue statutes applicable in the same action need not be in conflict; they may be supplementary or complementary.

A. THE TWO VENUE STATUTES ARE EQUALLY APPLICABLE AND ARE BOTH SPECIAL GRANTS OF VENUE.

Respondent's opposing briefs wrongly claim that the Bank Act offers a special venue statute, while the Exchange Act is only general. The Exchange Act venue provision is a special statute, cf., *General Electric Corporation v. James Talcott, Inc.*, 271 F.Supp. 699, 704 (S.D.N.Y. 1966).

Chase's Amicus brief, states (p. 4): ". . . a venue provision covering a specific subject must prevail over the federal venue statute of general application and greater

iatitude." In following paragraph S, Chase implies one must make a quantitative judgment as to extent to which a venue statute is special or general and only then may one compare the statutes to determine which controls. Boston Bank concurs (p. 17). Such an argument is convoluted. There is no authority for such a proposition. It is clear what constitutes a general venue statute. 28 U.S.C. §1391 is the general venue statute. Other venue statutes are special. It is simple to determine the scope of the general venue statute. The general statute applies "except as otherwise provided by law."

To claim that one special venue is more special than another is a concept foreign to decisions of this Court. Contrary to assertions by Boston Bank (p. 18), as between two special venue statutes, one is no more mandatory than the other. Certainly *Stonite Prods. Co. v. Melvin Lloyd Co.*, 315 U.S. 561 (1942), and *Fourco Glass Co. v. Transmirra Prods. Corp.*, 353 U.S. 222 (1957), do not support such a view. *Fourco* dealt with special venue in conflict with the general venue statute. *Stonite* dealt with a conflict to an exception to the general venue statute.

Such an argument would blur the clear distinction between the general statute and special venue statutes, and would lead to widespread uncertainty and confusion. That both venue statutes at bar are special, remains irrefutable.

Although the Bank Act may be "mandatory" against state law, it is not "mandatory" against another Act of Congress. There is no constitutional objection to Congress subsequently enlarging the scope of bank venue to additional districst in the 1933-4 remedial securities legislation. See SEC Amicus Brief, pp. 19-22 for discussion of concern by the 1933-4 Congress over bank related securities abuses.

Respondent refers to *Mercantile National Bank v. Langdeau*, 371 U.S. 555 (1963) and *Michigan National Bank v. Robertson*, 372 U.S. 591 (1963), for the proposition that the Bank Act is mandatory. This is accurate where state venue is involved, but not with another special Act of the Congress.

McCulloch v. Maryland, 4 Wheat. 316 (1819) and the Supremacy Clause compel the conclusion that states cannot subject National Banks to venue outside their districts. But no one has suggested any reason why Congress may not do so.

Respondent would have us partially ignore the Exchange Act. This is only for the Congress to do. The Court, in *Ronson, supra*, noted that in *Mercantile*, this Court had not been involved with the Exchange Act. Thus, *Mercantile* or *Michigan National Bank*, are not relevant authority at bar.

Certainly, if a resolution of this case can be found which will leave all Congressional enactments intact, the Court should adopt it. Here that requires recognition of the supplemental and cooperative nature of special venue statutes here involved.

B. THE TWO VENUE STATUTES ARE SUPPLEMENTARY AND NOT IN CONFLICT.

At bar, for the first time, this Court is presented with a case in which both statutes are special. Unless irreconcilable, both are fully applicable as grants of venue and plaintiff may select between them as best serves his rights.

Respondent and the Amicus briefs, in suggesting that Petitioner desires to nullify the Bank Act venue provisions, are actually themselves seeking to nullify those of the

Exchange Act. Instead, by both being fully viable, the Exchange Act merely enlarges the available forums in such specific securities actions.

Chase (Amicus p. 4) argues that previous Supreme Court decisions held the Bank Venue statutes "mandatory", "even though other venue statutes might permit suit elsewhere." But as has been shown, the cases decided by this Court merely indicate that it is mandatory against state law. The suggestion that the Bank Act venue provision is mandatory as against other special federal venue statutes is fallacious.

In accepting this great leap from "mandatory as against state law" to "mandatory as against other special federal venue statutes", without any authority from this Court, the lower courts have often been led to the erroneous conclusion that it is necessary for a plaintiff to find implied repeal. Respondent is suggesting that great leap here also.

McCulloch v. Maryland, supra, also casts doubts upon the contention that the Congress, in enacting the Bank Act, was creating a special privilege for national banks. That is the context in which national banks have long preferred to clothe the Bank Act, one of exceptional special privilege. To the contrary, the Bank Act may have been the necessary means in 1864 by which to remove such banks' prior immunity to suit as a federal instrumentality. At the very least, there is nothing in the history of passage of the Bank Act venue provision which suggests that Congress intended thereby to create an immunity which would transcend all other future federal statutes. Thus, Respondent's argument that when enacting the Exchange Act, the 1934 Congress had no need to incorporate a special venue exemption for national banks, is incorrect. Nothing in the Bank Act can be demonstrated as prohibiting the Congress

from expanding venue for national banks for the special purposes of the Exchange Act.

Boston Bank (pp. 15-17), makes it rather clear why both venue provisions should be fully effective (thus allowing Petitioner his choice of venue). If this Court should not find an implied repeal, that should result in a conclusion that the two venue provisions are capable of coexistence. As stated by Boston Bank (p. 15), in that event this Court must regard each as fully effective. That would mean, at bar, that a national bank may be sued either in its own district or in the district where it commits a securities fraud. Thus, each of the venue provisions remains fully effective.

The rule, *generalia specialibus non derogant*, has no application here (Boston Bank brief p. 15). The maxim has been applied in cases involving substantive enactments. Thus, in *Morton v. Mancari*, 417 U.S. 535, 551 (1974), this Court stated that "where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment." However, when two special venue statutes are involved, one does not control or nullify the other. If there is a way in which the two can be coordinated and not be repugnant, they are not in conflict; each is a separate grant.

The Congress did not say in 1864 that a national bank could *only* be sued in its district. Rather, it said that it *could* be sued in its district. Later in 1933-1934, it said a national bank in a securities case could be sued in specified additional districts. There is no conflict between those two statements; more so since enactment of the Bank Act venue provisions was not an attempt to grant immunity. Both provisions in 1864 and 1934 are grants of venue; neither is a

restriction. Thus, the Exchange Act venue provision need not operate as a substitute for the Bank Act venue provision, as wrongly suggested at p. 8 of the Comptroller's brief, but rather as an overlapping, but equally valid, added grant of venue.

Contrary to assertions by Boston Bank (p. 18), permitting the two venue statutes to coexist does not mean that banks may only be sued in their own district in securities cases. Rather, it means that banks can be sued only in their own district in all actions other than securities cases; while in securities cases they may be sued either in their own or in such other district as the Securities Act prescribes. This is certainly more logical than Respondent's position that since the statutes coexist, the Bank Act alone must prevail. Boston Bank's view ignores the fact that there is no authority whatever for a proposition that Bank Act venue is more "mandatory", "effective", "binding" or "special" than Exchange Act venue. Since both statutes are on a par, they are either totally repugnant or must be totally supplementary.

If the Court finds them supplementary, each grant of venue is applicable and plaintiff may choose between them precisely as he may choose between federal-question-jurisdiction and diversity-jurisdiction where both are applicable.

If, on the other hand, this Court finds they are totally repugnant, then there would be a partial implied repeal. In either case, the venue selected by Petitioner is valid.

POINT III

JUDICIAL ECONOMY

Apparently, neither Respondent nor either Amicus, chose to respond to Petitioner's contention that Respondent's interpretation of the Bank Act causes a gross waste of judicial economy and efficiency. It would result in plural securities actions being filed in numerous districts when a national bank is in a multi-party suit. This results in a waste of judicial expense and may result in conflicting adjudications, further appeals and similar consequences.

As more fully discussed in Petitioner's brief on the merits, when the principles of Multidistrict Litigation, 28 U.S.C. Section 1407, become involved, the results of proliferation in multiple forums can be more burdensome.

CONCLUSION

For the reasons set forth by Petitioner, it is respectfully submitted that the judgment of the Court of Appeals for the Second Circuit and the District Court for the Southern District of New York, should be reversed with directions that the motion by Boston Bank to dismiss on the ground of improper venue be denied.

Respectfully submitted,

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March 1976